Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250 RM-11849
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

COMMENTS OF AT&T

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AT&T respectfully submits these comments in response to the Commission's Public Notice, dated September 13, 2019, and Order Granting Extension of Time, released September 30, 2019, in the above-captioned matters.[1] The *Public Notice* seeks comment on a Petition for Rulemaking and a Petition for Declaratory Ruling filed by the Wireless Infrastructure Association (WIA) and a Petition for Declaratory Ruling filed by CTIA—The Wireless Association (CTIA).[2]

[1] Public Notice, *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition For Rulemaking, WIA Petition For Declaratory Ruling and CTIA Petition For Declaratory Ruling*, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849 (rel. Sept. 13, 2019) ("*Public Notice*"); Order Granting Extension of Time, *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849 (rel. Sept. 30, 2019).

[2] WIA Petition for Rulemaking (filed Aug. 27, 2019) ("WIA Rulemaking Petition"); WIA Petition for Declaratory Ruling (filed Aug. 27, 2019) ("WIA Petition"); CTIA Petition for Declaratory Ruling (filed Sept. 6, 2019) ("CTIA Petition").

INTRODUCTION AND SUMMARY

These Petitions for declaratory ruling and a new rulemaking give the Commission an important opportunity to accelerate the deployment of 5G wireless services. Next-generation 5G services promise enormous benefits for American consumers and the economy, but 5G services will require much denser networks of cell sites than before. As Chairman Pai recently noted, "We need to install hundreds of thousands of small cells—an exponential increase in the number of antenna locations for our current networks."[3] Although wireless providers have already invested billions of dollars to deploy 5G and to begin offering service, the process of deployment is ongoing and the nation remains at a critical juncture in the global race for 5G leadership. Accordingly, the Commission should continue to take all reasonable steps to clear away any remaining regulatory hurdles that would prevent the most rapid possible deployment of 5G.

As these Petitions demonstrate, local government approvals for the deployment of cell sites continue to be such a hurdle. In particular, as the Petitions show, localities are misinterpreting many aspects of the Commission's rules implementing Section 6409(a) of the Spectrum Act.[4] In Section 6409(a), Congress federalized the approval process for collocating transmission equipment on *existing* towers and base stations that local authorities have *already* vetted and approved for use as wireless broadband infrastructure. Indeed, it is important to emphasize that Section 6409(a) applies only to incremental changes—*i.e.*, to proposed modifications that would not "substantially change the physical dimensions" of such existing towers and base stations. As Congress rightly saw, requests to make incremental changes to existing infrastructure typically

[3] Remarks of FCC Chairman Ajit Pai at the New York State Wireless Association, New York, NY (June 21, 2019); *see also id*. ("When it comes to 5G policy, infrastructure is essential.").

[4] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, title VI, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)) ("Spectrum Act").

should not pose difficult approval issues, and therefore Section 6409(a) mandates that a state or local government "may not deny, and shall approve" any eligible facilities request for such modifications. The Commission's implementing rules include a 60-day shot clock that gives local authorities plenty of time to consider any legitimate issues that may arise in the approval process, but which ensures that they "approve" such requests, and not "deny" them through inaction.

As the Petitions document, however, many localities are violating the Commission's rules and claiming that various types of eligible facilities requests ("EFRs") fall outside the Section 6409(a) process and the 60-day shot clock. AT&T has also experienced these issues and supports CTIA's and WIA's requests for a declaratory ruling to clarify the operation of the Commission's implementing rules and resolve these controversies. As explained below, these issues fall into three broad categories. *First*, AT&T agrees with CTIA and WIA that the Commission should clarify that the exceptions to the Section 6409(a) process relating to concealment elements and equipment cabinets are very narrow, and that the exception for changes above a certain height are to be measured with respect to an entire building, not solely the portion of the building housing the antennas. *Second*, with respect to the shot clock, AT&T agrees that the Commission should clarify that a single shot clock applies to all authorizations necessary for approval; that if the local authority does not act within 60 days, the requesting provider may begin modifying the facility immediately thereafter; and that conditional approvals are not permitted under Section 6409(a), but instead are deemed to be a failure to act. *Third*, AT&T agrees with WIA that the Commission should clarify a discrete set of additional issues to prevent local authorities from adopting interpretations that defeat Section 6409(a)'s protections.

CTIA also asks for a declaratory ruling to resolve two categories of disputes that have arisen under Section 224, which requires utilities to provide cost-based, non-discriminatory access

to poles, ducts, conduits, and rights-of-way.[5] *First*, AT&T agrees that the Commission should reaffirm that Section 224 applies specifically to light poles. *Second*, AT&T also agrees that Section 224 does not permit utilities to adopt blanket prohibitions against attachments on portions of poles, without providing any legitimate justification.

Finally, AT&T also supports WIA's request for a rulemaking to reconsider the rule governing collocations requiring a limited expansion of the facility. Although the current rule treats any excavation beyond the current site as a substantial change (and thus outside the protections of Section 6409(a)), the Commission should consider whether the standard for new construction, which allows a 30-foot buffer zone, would be more appropriate. AT&T also supports WIA's request for a rule explicitly requiring, in the context of Section 6409(a), that fees charged by municipalities for processing EFRs must be based on reasonable costs incurred by the municipality to process the request.

I. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO RESOLVE CERTAIN ONGOING DISPUTES ABOUT WHETHER LOCAL AUTHORITIES MUST PROCESS REQUESTS FOR MODIFICATIONS UNDER THE SECTION 6409(a) PROTECTIONS.

Section 6409(a)(1) of the Spectrum Act provides that, "[n]otwithstanding . . . any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request ["EFR"] for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[6] The Commission implemented this statutory mandate by adopting rules defining more specifically what constitutes a "substantial change" and establishing a 60-day "shot clock" for localities to grant modifications

[5] 47 U.S.C. § 224.

[6] 47 U.S.C. § 1455(a)(1).

that do not constitute a substantial change.[7] Although these rules have been generally successful, CTIA's and WIA's Petitions (and AT&T's own experience) demonstrate that a significant number of localities are adopting incorrect interpretations of these rules that (1) purport to designate an extraordinarily broad range of modification requests as a "substantial change" and (2) otherwise circumvent the 60-day shot clock. These clearly erroneous misinterpretations of the statute and rules are causing substantial delays in AT&T's deployment of 5G infrastructure. Accordingly, AT&T agrees with CTIA and WIA that the Commission should promptly confirm that these localities are misinterpreting Section 6409(a) and the Commission's implementing rules.[8]

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[7] Report and Order, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865, ¶¶ 135-240 (2014) ("*2014 Wireless Infrastructure Order*").

[8] The Commission has ample authority to resolve controversies and to remove uncertainty by issuing a declaratory ruling. 47 C.F.R. § 1.2(a) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."); 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); *see also Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("The Commission is authorized to issue a declaratory ruling 'to terminate a controversy or remove uncertainty,' and there is no question that a declaratory ruling can be a form of adjudication . . . ." (citations omitted)). Indeed, as Petitioners note, the Commission has previously issued declaratory rulings to address a number of prior controversies concerning local permitting for the deployment of wireless infrastructure. *See, e.g.*, Declaratory Ruling and Third Report and Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 30 FCC Rcd 9088 (2018) ("*2018 State/Local Infrastructure Order*"); Third Report and Order and Declaratory Ruling, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 7705 (2018) ("*2018 OMTR/Moratoria Order*"); Declaratory Ruling, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd 13994 (2009) (interpreting the statute's phrase "reasonable period of time"), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

A. To Determine If a Modification Is a "Substantial Change," the Commission Should Clarify the Narrow Scope of the "Concealment Element" and "Equipment Cabinet" Exceptions and the Height Limitations as They Apply to a "Base Station."

Congress has determined that localities "may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[9] This requirement avoids unnecessary delays in modifications to network infrastructure that have no substantial impact on the tower or base station. As described below, however, a number of localities have adopted various strategies to thwart this requirement, resulting in substantial delays or cessation of much needed infrastructure deployments. Accordingly, for the reasons below, AT&T supports the proposal of CTIA and WIA to put an end to these practices by clarifying its rules relating to "concealment elements," "equipment cabinets," and the definition of "base station."

1. Concealment Elements.

Rule 1.6100(b)(7)(v) provides that a proposed modification qualifies as a "substantial change," and thus falls outside the protections of Section 6409(a), if "it would defeat the concealment elements of an eligible support structure."[10] A number of localities have seized on this narrow exception to designate all kinds of modifications, such as changes in height, width, or equipment, as changes to concealment features. These expansions of the concealment exception are clearly incorrect and are causing delays in the deployment of 5G infrastructure. If such generic features as height, width, or equipment could be construed as concealment elements, the concealment exception would swallow the rule, nullifying the Section 6409(a) protections adopted

[9] 47 U.S.C. § 1455(a)(1).

[10] 47 C.F.R. § 1.6100(b)(7)(v).

by Congress. Accordingly, AT&T agrees with the proposals of CTIA and WIA that the Commission re-confirm that these exceptions should be narrowly construed in two respects.

First, the concealment exception applies only to "stealth wireless facilities," and only to the stealth "elements" of such facilities.[11] In adopting this exception, the Commission explained that it would apply only "in the context of a modification request related to *concealed* or '*stealth*'-designed facilities—*i.e.*, facilities designed to look like some feature other than a wireless tower or base station."[12] In other words, the exception potentially applies only to facilities where the owner has implemented an affirmative *disguise*, and only when the proposed modification would defeat the specific elements of the structure that accomplish that disguise.

In this respect, the Commission should clarify that there is no merit to claims by localities that generic features which are characteristics of any eligible support structure, such as height, width, or equipment on the structure, are "concealment elements" within the meaning of the rule. Similarly, the Commission should clarify that there is no merit to claims by localities that the placement of coaxial cable or other essential components of a wireless facility on a *non-stealth* monopole defeats concealment, as the monopole has no "disguise" and thus is not a "concealed or 'stealth'-designed facility" to which the rule could even apply.[13] Under these localities' interpretations, any modification to a tower or base station would defeat a concealment element, wholly undermining Section 6409(a).

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[11] *2014 Wireless Infrastructure Order* ¶ 200 ("[A] modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting façade or artificial tree branches, should be considered substantial under Section 6409(a).").

[12] *Id.* (emphasis added).

[13] WIA Petition at 10.

Second, the Commission should reiterate that the concealment exception applies only to modifications that *defeat* the concealment elements. Modifications that do not materially change the appearance of the concealment elements of a stealth structure are not "substantial changes" under the rule. Here again, the Petitions document a number of cases in which the requested modification might require a change to the concealment element, but that change does not *defeat* the concealment element because the typical observer would not perceive any difference.[14] AT&T has experienced similar issues with localities. Such modifications do not fall within the concealment element exception to the Section 6409(a).

2. Equipment Cabinets.

Rule 1.6100(b)(7)(iii) states that a modification to an eligible support structure is a "substantial change" if it "involves installation of more than the standard number of equipment cabinets for the technology involved, but not to exceed four cabinets."[15] As both Petitions correctly explain, a number of localities are applying this exception too broadly, and refusing to consider routine modification requests under the Section 6409(a) process. AT&T therefore supports the Petitions' proposals that the Commission clarify the scope of this exception, in two respects.

First, the Petitions correctly note that some localities have been treating the installation of remote radio units on towers or poles as the installation of "equipment cabinets."[16] AT&T agrees with the Petitioners that "equipment cabinet," for purposes of this rule, refers only to cabinets that

[14] CTIA Petition at 11; WIA Petition at 10-11.

[15] 47 C.F.R. § 1.6100(b)(7)(iii).

[16] CTIA Petition at 13-14; WIA Petition at 13.

are not attached to the structure. This interpretation follows naturally from both the structure of the rule and common industry usage.

Subsections (i) and (ii) of Rule 1.6100(b)(7) provide that modifications that result in certain height or width changes to the eligible support structure, which would include equipment added on the pole itself, are considered a substantial change. In context, subsection (iii), which addresses modifications that would add equipment cabinets, logically does not apply to pole-installed equipment and instead applies only to "cabinets" that are installed on the ground or elsewhere on the premises. As CTIA correctly explains, the localities' contrary interpretation would create a severe disincentive to encase equipment on structures.[17]

Petitioners' interpretation is also more consistent with common industry understandings of what constitutes an "equipment cabinet." In the past, the Commission has typically referred to equipment cabinets as enclosures that are installed "on the ground," not on a tower.[18] The Broadband Deployment Advisory Committee's model code similarly refers to cabinets as "ground-mounted equipment."[19] Enclosures on a tower, pole, or structure are typically not considered to be "equipment cabinets," and the Commission should clarify that, for purposes of this rule, such cabinets are, by definition, not attached to the structure itself.

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[17] CTIA Petition at 14.

[18] *2014 Wireless Infrastructure Order* ¶ 93 n.252 (referring to "ground-mounted cabinets"); *id.* ¶ 176 ("[T]he Commission observed that the Collocation Agreement similarly construes the mounting of an antenna 'on a tower' to encompass installation of associated equipment cabinets or shelters on the ground."); Notice of Proposed Rulemaking, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 28 FCC Rcd 14238 ¶ 114 (2013) ("*Infrastructure NPRM*") ("We note that the Collocation Agreement similarly construes the mounting of an antenna 'on a tower' to encompass installation of associated equipment cabinets or shelters on the ground.").

[19] Broadband Deployment Advisory Committee, Model Code for Municipalities, § 3.6(i); *id.* § 3.6(ii) (discussing "[g]round-mounted equipment for Wireless Facilities, including any buildings, cabinets or shelters").

Second, Petitioners correctly note that some localities are treating the rule's four-cabinet limit as a global limitation that applies to the entire structure, rather than a limit on how many cabinets the requesting provider may add as part of the modification.[20] The rule addresses whether a *modification* would substantially change the physical dimensions of the structure, and just as a matter of proper grammar, the phrase "but not to exceed four cabinets" makes sense only as a limitation on the principal clause in the sentence, which focuses on how many "new equipment cabinets" the proposed modification requires.[21] Treating the four-cabinet rule as a *cumulative* limitation would make no sense and would push many requests concerning equipment cabinets outside the scope of the Section 6409(a) protections. Accordingly, the Commission should also specifically clarify that the four-cabinet limit applies per eligible facilities request, not per facility.

3. Definition of Base Station.

AT&T agrees with CTIA that some localities are predetermining that a modification constitutes a substantial change in a base station's physical dimensions, and hence falls outside of Section 6409(a), by narrowly (and selectively) defining the term "base station." For example, as CTIA documents, some localities, when evaluating modifications to existing facilities on buildings, assess how the modification changes the dimensions (*e.g.*, the height) of only the specific *portion* of the building where the existing antennas are installed rather than assessing how the modification changes the dimensions of the whole base station (*i.e.*, the building).[22] This interpretation is contrary to the explicit language of the rule.

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[20] CTIA Petition at 14; WIA Petition at 13.

[21] 47 C.F.R. § 1.6100(b)(7)(iii) (modification is a substantial change if, "[f]or any eligible support structure, it [*i.e.*, the modification] involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets").

[22] CTIA Petition at 16.

A "base station" is "a structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network," and excludes "towers."[23] Accordingly, a building on which providers have installed antennas is a "base station" within the meaning of the rule. A modification to a base station constitutes a substantial change if it "increases the height of the structure [*i.e.*, the base station] by more than 10% or more than ten feet, whichever is greater."[24] Nothing in the rule refers to, or suggests that the height limitation should be applied to, only a "portion" of the structure (*i.e.*, the building); it plainly refers only to the "structure" itself. These localities are thus arbitrarily reading a limiting condition into the Commission's rule that does not exist. And, in so doing, these localities are denying or delaying installation of infrastructure that is greatly needed and clearly covered by the Commission's rules. Accordingly, AT&T agrees that the Commission should clarify that the "base station" is the "structure"—*i.e.*, the building—not a part of the building or even a particular apparatus on the building where the antennas are installed.[25]

B. The Commission Should Clarify How and When the Shot Clock Applies and What Remedies Requesting Providers Have.

In Section 6409(a), Congress directed that local authorities "may not deny, and shall approve" EFRs.[26] The Commission implemented this mandate by imposing a 60-day shot clock, recognizing the risk that a locality "could evade its statutory obligation to approve covered applications by simply failing to act on them, or [by imposing] lengthy and onerous processes" on

[23] 47 C.F.R. § 1.6100(b)(1).

[24] 47 C.F.R. § 1.6100(b)(7)(i).

[25] *See id.*

[26] 47 U.S.C. § 1455(a)(1).

applicants.[27] At the time that it implemented Section 6409(a), the Commission expressed a desire to balance the timely processing of applications against an interest in preserving some flexibility for State and local governments.[28] The record in this docket (and AT&T's own experience), however, demonstrates that some localities are abusing this flexibility by misconstruing the 60-day shot clock in ways that undercut Section 6409(a)'s goal of promoting the rapid deployment of wireless infrastructure.[29] The Commission should clarify that: (1) a single shot clock applies to all necessary applications and begins when the requesting provider makes a good faith effort to submit an EFR; (2) the requesting provider may begin modifying the facility immediately if the locality does not act within the 60-day shot clock; and (3) a conditional approval violates Section 6409(a) and should be deemed a failure to act.

1. The Commission Should Clarify that the 60-Day Shot Clock Applies to All Authorizations and Begins to Run When the Applicant Attempts to Seek Approval, Including in "Pre-Application" Processes.

Individual localities' evasions of the shot clock take various forms. Some localities apply the shot clock only to a small subset of all authorizations required to modify a site, while others treat each request for multiple authorizations as a separate EFR with a separate shot clock.[30] These misinterpretations artificially limit the reach of the shot clock, such that localities no longer need to meet their 60-day limit for approving EFRs. When faced with similar tactics in the Section 332 shot clock context, the Commission clarified that a single shot clock applies to all necessary authorizations, such as zoning, building, and electrical permits.[31] The Commission should do the

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[27] *2014 Wireless Infrastructure Order* ¶ 212.

[28] *Id.* ¶ 221.

[29] 47 U.S.C. § 1455(a)(1).

[30] WIA Petition at 5-6.

[31] *2018 State/Local Infrastructure Order* ¶ 144.

same here in the context of Section 6409(a) and clarify that a single 60-day shot clock applies to all authorizations and permits related to a modification. This clarification follows from the text of Section 6409(a) and the implementing rule. As the Commission reasoned in the context of Section 332, the phrase "*any* request for authorization" makes use of "the expansive modifier 'any'" to refer to *all* necessary authorizations.[32] The same reasoning applies here, where Section 6409(a)'s instruction to "approve[] *any* eligible facilities request" indicates an obligation to approve *all* authorizations required for a modification.[33]

In addition, the Commission should provide further guidance on when the Section 6409(a) shot clock begins to run. As shown in the record, some localities have undermined the 60-day shot clock by contending it does not start until they have established procedures for reviewing EFR applications, or until the EFR is deemed received after being bounced from one department to another.[34] Other localities maintain that the shot clock does not start during what they consider to be *pre-application* requirements or processes, including, for example, the holding of public hearings.[35] As the Commission has recognized elsewhere, such attempts could "allow for complete circumvention of the shot clocks by significantly delaying their start date."[36] Faced with similar attempts to stall the Section 332 shot clock, the Commission previously clarified that "the shot clock begins to run when the application is proffered . . . notwithstanding [a] locality's refusal

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[32] *Id.* ¶¶ 132-33 (emphasis added); *see* 47 U.S.C. § 332(c)(7)(B)(ii).

[33] 47 U.S.C. § 1455(a)(1) (emphasis added); *see also id.* § 1455(a)(2) (defining an EFR as "*any* request for modification of an existing wireless tower or base station" (emphasis added)); 47 C.F.R. § 1.6100(b)(3) (same).

[34] WIA Petition at 8.

[35] *Id.* at 9; *see, e.g.*, *Board of Cty. Comm'rs for Douglas Cty. v. Crown Castle USA, Inc. et al.*, No. 17-3171, 2019 WL 4257109, at *3 (D. Colo. Sept. 9, 2019) (county argued that defendants had proffered a "Presubmittal Review Request" and not an EFR application).

[36] *2018 State/Local Infrastructure Order* ¶ 145.

to accept it."[37] The Commission should do the same for Section 6409(a) and clarify that the shot clock commences once an applicant in good faith seeks local government approval and submits an EFR under any reasonable process, not when a locality deems the application received or when it begins reviewing the application.

As a corollary, the Commission should further clarify that any pre-application requirements and procedures start the shot clock. This too echoes the Commission's previous Section 332 clarification that "pre-application procedures and requirements do not toll the shot clocks."[38] In the context of the Section 6409(a) clock, the Commission has already made clear that a local moratorium on processing applications does not stop the shot clock.[39] Neither should any other attempts to delay the start of the shot clock, including pre-application procedures. The only court to have examined the timeframe for review under Section 6409(a) recognized as much, deciding that the shot clock continued to run even though the county reviewing the application styled the process as a "Presubmittal Review."[40]

2. The Commission Should Clarify that the Deemed Granted Remedy Means an Applicant May Proceed Even If the Locality Does Not Timely Issue Related Permits.

If a reviewing authority fails to act within the Section 6409(a) 60-day shot clock period, the Commission's rules provide that "the request shall be deemed granted" and the deemed grant "become[s] effective" when "the applicant notifies the applicable reviewing authority in writing."[41] To avoid any confusion over when an applicant may proceed with a modification, the

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[37] *Id.*

[38] *Id.*

[39] *2014 Wireless Infrastructure Order* ¶ 219; *2018 State/Local Infrastructure Order* ¶ 145.

[40] *Board of Cty. Comm'rs for Douglas Cty.*, 2019 WL 4257109, at *6.

[41] 47 C.F.R. § 1.6100(c)(4).

Commission should clarify that "become effective" in the rule means that the applicant may lawfully modify the facility without waiting for any local action, such as obtaining a permit. This timeline is consistent with that outlined by then-Commissioner Pai in his statement accompanying the *2014 Wireless Infrastructure Order*, in which he noted the Order "makes clear that an applicant can start building on day 61 if a municipality doesn't act on its application."[42] Moreover, to prevent confusion regarding when a locality is considered to have failed to act when an application is denied, the Commission should clarify that a denial must meet the following criteria: (1) be in writing, (2) clearly and specifically make a determination that the request is not covered by Section 6409(a), and (3) include a clear explanation of the reasons for the denial—and that otherwise the shot clock continues to run.[43]

If a single shot clock applies to all necessary authorizations, as the Commission should now clarify that it does, it also follows that when an application is deemed granted, the grant applies to all authorizations and permits needed for the proposed modification. The Commission should therefore clarify that, once the deemed grant becomes effective, applicants may lawfully move forward with the proposed modification even if the locality has failed to timely issue other permits for the modification. Without such a clarification, a locality could effectively nullify the deemed grant by simply withholding some other permit from the applicant. As courts have consistently recognized, the deemed granted remedy operates through federal law and "obviates the need for the states to affirmatively approve applications."[44] Once an application is deemed

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[42] *2014 Wireless Infrastructure Order*, Statement of Commissioner Ajit Pai.

[43] *See T-Mobile South, LLC v. City of Roswell*, 574 U.S. 293 (2015); *Board of Cty. Comm'rs for Douglas Cty.*, 2019 WL 4257109, at *4-6 (holding that a statement of non-approval by zoning staff in "Presubmittal Review" did not constitute a denial of the application and the 60-day shot clock continued to run).

[44] *Montgomery Cty. v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015); *see ExteNet Sys., Inc. v. Vill. of Pelham*, 377 F. Supp. 3d 217, 226 (S.D.N.Y. 2019) (noting that Section 6409(a) "confers on

granted by a locality's failure to act, no further act from the locality should be needed in order for the applicant to proceed with the modification.

3. The Commission Should Clarify that Conditional Approvals Are Improper and Should Be Construed As Failures to Act.

The record indicates that localities are issuing conditional approvals that purport to approve an EFR but only if the applicant accepts onerous conditions, such as paying costly bond and escrow fees, complying with cumbersome landscaping, painting, and lighting requirements, or even granting the locality authority to remove a site at its discretion.[45] Such conditions contravene Section 6409(a), which specifically instructs localities to approve EFRs "[n]otwithstanding . . . any other provision of law."[46] As the Commission has previously explained, Section 6409(a) "leaves no room" for local discretion: once an application meets the statutory criteria, the locality must approve it.[47] Thus, conditional approvals, which are effectively denials of the application unless the applicant complies with improper conditions, violate the statute (unless they are generally applicable health and safety requirements, which the Commission has allowed).[48] Moreover, conditional approvals cannot be said to be final determinations on an application because they depend on the applicant's future fulfillment of the attached conditions to the locality's

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telecommunications companies the right to make such modifications without having to seek local approval").

[45] WIA Petition at 20-21.

[46] 47 U.S.C. § 1455(a)(1).

[47] *2014 Wireless Infrastructure Order* ¶ 227; *see also Montgomery Cty.*, 811 F.3d at 130 ("[D]isplace[ment of] discretionary municipal control over certain facility modification requests . . . is exactly what Congress intended by forbidding localities from denying qualifying applications.").

[48] *See 2014 Wireless Infrastructure Order* ¶ 202 ("[W]e clarify that Section 6409(a) does not preclude States and localities from continuing to require compliance with generally applicable health and safety requirements . . . .").

satisfaction. Given that they are provisional and non-final, conditional approvals should not be treated as having discharged the locality's obligations under Section 6409(a) and the shot clock.[49] Accordingly, the Commission should clarify that all conditional approvals, other than those involving health and safety requirements, constitute failures to act such that the application may be deemed granted.[50] Alternatively, the Commission should clarify that any such conditions in an approval of an EFR are void and have no effect on the approval of the application.

C. The Commission Should Also Issue a Declaratory Ruling To Clarify Additional Issues Identified by WIA.

WIA identifies several additional disputes that the Commission should also resolve with a declaratory ruling, dealing with (1) conditions unrelated to the EFR; (2) the scope of "current site" in Rule 1.6100(b)(7)(iv); (3) burdensome documentation requirements; and (4) use permits.

Conditions Unrelated to the EFR. Some localities delay processing of EFRs by claiming that an otherwise eligible EFR is ineligible if the support tower or base station fails to comply with prior permit conditions, even if the modification proposed in the EFR has nothing to do with the non-compliant condition and would not be responsible for creating it.[51] AT&T supports WIA's request that the Commission clarify that Section 1.6100(b)(7)(vi) applies only when the *proposed modification* would cause non-compliance with previously imposed conditions.

Section 1.6100(b)(7)(vi) provides that "a *modification* substantially changes the physical dimensions of" a tower or base station if "[*i*]*t* [*i.e.*, the modification] does not comply with conditions associated with the siting approval of the construction or modification of the eligible

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[49] *Cf. Board of Cty. Comm'rs for Douglas Cty.*, 2019 WL 4257109, at *4-6 (determining that county's "Presubmittal Review" did not constitute final action on the application).

[50] *See* 47 C.F.R. § 1.6100(c)(4).

[51] WIA Petition at 14-15.

support structure or base station equipment . . . ."[52] In other words, a substantial change occurs only if the *proposed modification* would create a violation of conditions associated with the local approval of a structure; any unrelated or existing violations pertaining to the original structure are not relevant in considering the modification's eligibility under Section 6409(a).[53]

This is consistent with the Commission's policy that "legal, non-conforming structures should be available for modification under Section 6409(a), as long as the modification itself does not 'substantially change' the physical dimensions of the supporting structure as defined here."[54] As the Commission recognized, allowing localities to dredge up unrelated violations when reviewing an EFR "could thwart the purpose of Section 6409(a) altogether," as localities could make "simple changes to local zoning codes [that] could immediately turn existing structures into legal, nonconforming uses unavailable for collocation under [Section 6409(a)]."[55] As a logical corollary to this existing policy, the Commission should grant WIA's request to clarify that, under

[52] 47 C.F.R. § 1.6100(b)(7)(vi) (emphasis added).

[53] Rule 1.6100(b)(7)(vi) also provides an exception: "[T]his limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the threshold identified in" the preceding sections defining substantial change. *Id.* Thus, to the extent a proposed modification is otherwise not a substantial change under subsections (i)-(iv), it cannot be made into a substantial change simply by claiming non-compliance with local siting approvals.

[54] *2014 Wireless Infrastructure Order* ¶ 201; *see id.* ("We accordingly reject municipal arguments that any modification of an existing wireless tower or base station that has 'legal, nonconforming' status should be considered a 'substantial change' to its 'physical dimensions.'").

[55] *Id.* ("Considering Congress's intent to promote wireless facilities deployment by encouraging collocation on existing structures, and considering the requirement in Section 6409(a) that States and municipalities approve covered requests '[n]otwithstanding . . . any other provision of law,' we find the municipal commenters' proposal to be unsupportably restrictive.").

Section 1.6100(b)(7)(vi), an EFR may not be delayed or denied simply because of non-compliant conditions that do not have anything to do with the proposed modification.[56]

"Current Site" Under Section 1.6100(b)(7)(iv). Section 1.6100(b)(7)(iv) states that a substantial change occurs if a proposed modification would require "excavation or deployment outside the current site."[57] Some localities interpret "current site" as the *original* or *initial* site boundaries and use that interpretation to wrongly classify some proposed modifications as substantial changes.[58] AT&T supports WIA's proposal that the Commission reaffirm that it meant what it said: for purposes of Rule 1.6100(b)(7)(iv), the original boundaries of a site where boundaries have changed are irrelevant for the EFR analysis and, in that instance, the "current site" means "*the current boundaries* of the leased or owned property surrounding the tower and any access or utility easements currently related to the site."[59] A clarification to this effect would ensure that changes in the site boundaries over the years would not prevent an otherwise qualifying EFR from being approved.

Burdensome Documentation. As WIA notes, many localities are imposing various kinds of process or information requirements that are substantially delaying or defeating the protections of Section 6409(a). Many localities require burdensome documentation as part of the application process—*i.e.*, before they will consider an EFR.[60] The Commission has already made clear that localities "may only require applicants to provide documentation that is reasonably related to

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[56] For similar reasons, AT&T also supports WIA's request for a declaratory ruling that localities cannot refuse to process EFRs because of "blight" on the wireless facility or elsewhere on the property. *See* WIA Petition at 16-17.

[57] 47 C.F.R. § 1.6100(b)(7)(iv).

[58] WIA Petition at 18.

[59] *2014 Wireless Infrastructure Order* ¶ 198 (emphasis added).

[60] WIA Petition at 21-23.

determining whether the request meets the requirements of [Section 6409(a)]."[61] Although localities may be entitled to some of these types of documentation as part of its general regulatory oversight outside of the Section 6409(a) process, the Commission should make clear again that these localities cannot insist that such documentation be included in EFRs or condition approvals on the submission of these types of documentation.

Use Permits. Some jurisdictions have imposed other permitting requirements that must be met before they will consider an EFR application. For example, localities have required EFR applicants to modify the underlying use permit, or to submit or have pending only a limited number of permits at a time, or to submit excessive documentation such as inspection reports, structure drawings, and detailed engineering analyses—much of which is not relevant to the statutory question of whether the request qualifies as an EFR under Section 6409(a).[62] Such requirements defeat the purpose of Section 6409(a) to expedite eligible collocation requests that constitute only minor modifications to a site, turning the EFR process into a series of difficult regulatory hurdles.[63] AT&T supports WIA's proposal that the Commission declare that all documentation requests and process requirements must be reasonably related to determining whether a proposal qualifies as an EFR under Section 6409(a). Otherwise, this potential "loophole in Section 6409" would allow localities, by "refusing ancillary permissions, such as building or highway permits," to delay or

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[61] *2014 Wireless Infrastructure Order* ¶¶ 21, 214.

[62] WIA Petition at 23 & n.69. The special use permits that some jurisdictions require often themselves involve layers and layers of approval processes—such as landscaping and fencing requirements, proof of need, engineering consultant review requirements, property value impact analyses, restrictive height and equipment size limits, and minimum separation and set back requirements—which further delay the EFR application. *See* Verizon Comments, WT Docket No. 17-79, WC Docket No. 17-84, at 35-36 (filed June 15, 2017).

[63] *See 2014 Wireless Infrastructure Order* ¶ 257 n.684 (describing an instance where Crown Castle "went before a local reviewing board eight times, and [] 'with each review the Town alleged new and different 'deficiencies' with the permit applications").

effectively block otherwise qualified EFRs.[64] As the Commission has recognized in the context of Section 332, all permits related to a site can hinder deployment, and thus fall within the ambit of state and local duties under Section 6409(a)[65]—as well as the prohibition on local regulations that would pose a barrier to entry.[66] A clarification from the Commission that localities cannot impede EFRs by conditioning their review on other permitting requirements would close this potential loophole and help ensure the smooth approval of EFRs.

II. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO CLARIFY THAT SECTION 224 APPLIES TO LIGHT POLES AND DOES NOT PERMIT BLANKET PROHIBITIONS ON INSTALLING WIRELESS EQUIPMENT.

CTIA correctly explains that some utilities are flouting the requirements of 47 U.S.C. § 224 ("Section 224") and the Commission's implementing rules. First, many electric utilities assert that Section 224 does not apply to "light poles" and thus deny access to those poles or allow access only on onerous terms, such as the payment of exorbitant access fees or the placement of dark fiber. Second, some electric utilities continue to impose blanket prohibitions against the installation of 5G (and other) wireless equipment on parts of their poles. These practices are impeding deployment of 5G wireless infrastructure, which depends in significant part on reasonable and timely access to utility poles, including light poles, at reasonable rates. Thus, AT&T supports CTIA's proposal that the Commission clarify that Section 224: (1) applies to

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[64] *2018 State/Local Infrastructure Order*, Statement of Commissioner Michael O'Rielly; *see 2014 Wireless Infrastructure Order* ¶ 257 n.684 (describing "instances in which local authorities have significantly delayed action on applications through successive unrelated data requests").

[65] *2018 State/Local Infrastructure Order* ¶ 144 ("[M]ultiple authorizations may be required before a deployment is allowed to move forward. . . . All of these permits are subject to Section 332's requirement to act within a reasonable period of time . . . .").

[66] 47 U.S.C. § 253(a); *see Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 491 (2002).

utility-owned or controlled light poles, and (2) does not permit utilities to impose blanket prohibitions on installing wireless equipment on parts of their poles.

A. The Commission Should Clarify that Light Poles Are "Poles" Under Section 224 and Utilities Must Provide Cost-Based, Non-Discriminatory Access to Such Poles.

Section 224 requires utilities to provide cable companies and telecommunications providers access to "any pole" they own or control, subject to rates regulated by the Commission.[67] As CTIA correctly explains, however, some electric utilities are not following this requirement, asserting that "light poles" are not governed by Section 224.[68] As a result, these electric utilities are demanding excessive fees (or in-kind physical plant contributions) for access to light poles or denying access altogether, impeding deployment of 5G facilities.[69] For example, three electric utilities operating in Texas refuse to allow AT&T access to light poles.[70] An electric utility in Florida allows AT&T access to only those light poles where AT&T will install (and donate to the

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[67] 47 U.S.C. § 224.

[68] CTIA Petition at 22.

[69] *Id.* Congress and the Commission have long recognized that the successful deployment of telecommunications networks depends on access to existing poles and other structures, and that the owners of the poles are "in a position to extract monopoly rents . . . in the form of unreasonably high pole attachment rates." Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 ¶ 4 (2011) ("*2011 Pole Attachments Order*"); *see Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002). Today, these requirements are becoming increasingly important as the network densification required for 5G deployment is more dependent on pole access than ever. Specifically, light poles—which already line most rights-of-way at suitable distances—are crucial for deploying the smaller cells required for 5G. Without access to light poles, "[t]he start up costs of constructing an entirely new set of poles" for 5G deployment would be "prohibitive, and when coupled with the difficulties of obtaining regulatory approval . . . , the barriers to such construction are insurmountable." *Southern Co.*, 293 F.3d at 1341; *see Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002).

[70] One Texas city helped AT&T circumvent the hurdle by requiring the electric utility to remove its light poles so that AT&T, at its expense, could deploy a similar pole that would be used to support the needed small cell facilities. But, even in that city, the electric utility delayed (and continues to delay) AT&T's small cell deployments and increased (and continues to increase) deployment costs unnecessarily.

utility) dark fiber. Multiple other electric utilities across the country have taken similar positions. To end these harmful practices, the Commission should adopt CTIA's proposal to confirm that Section 224 applies to light poles.

That Section 224 governs utility-owned or controlled light poles should not be controversial. Section 224 imposes a duty on utilities that expressly applies to "any pole": "A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to *any* pole, duct, conduit, or right-of-way owned or controlled by it."[71] There is no exception for light poles. And where Congress intended to create exceptions to the application of Section 224, it did so expressly.[72] The lack of any express exception for light poles thus confirms that Congress intended Section 224 to apply to light poles owned or controlled by the electric utility.[73]

Federal courts and Commission precedent support this plain reading of the statute. The Eleventh Circuit has held that Section 224 applies to all poles owned or controlled by a utility:

> Section 224(f)(1) provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to *any* pole, duct, conduit, or right-of-way owned or controlled by it." . . . "[T]he adjective 'any' is not ambiguous; it has a well established meaning." "Read naturally, the word 'any' has an expansive meaning . . . . [When] Congress [does] not add any language limiting the breadth of that word, . . . 'any' means 'all.'" In this context, "the lack of a limitation upon the adjective 'any' means

[71] 47 U.S.C. § 224(f)(1) (emphasis added); *see* 47 C.F.R. § 1.1401 *et seq.*

[72] For example, Congress in Section 224 explicitly excludes railroads, coops, and government entities from the definition of "utility," excludes incumbent local exchange carriers from the definition of "telecommunications carrier," and allows utilities to deny pole access due to "insufficient capacity" or concerns related to "safety, reliability, and generally applicable engineering." 47 U.S.C. §§ 224(a)(1), (a)(5), (f)(2).

[73] *See* First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1123 (1996) ("*1996 Local Competition Order*") ("[W]e believe section 224(f) reflects Congress' determination that utilities generally must accommodate requests for access by telecommunications carriers and cable operators.").

> that § 224(f)(1) expands the Act's coverage to *all* 'poles, ducts, conduits, or rights-of-way owned or controlled by a utility.'"[74]

And just last year, the Commission expressly held that the analogous state and local obligations to allow access to their property in the right-of-way under Sections 253 and 332 cover "light poles."[75] Section 224, which explicitly extends to "poles," mandates that conclusion for utilities even more clearly.[76] Similarly, the Commission's Broadband Deployment Advisory Committee has included poles used for "lighting" as poles to be provided access in their model codes for states and for municipalities.[77]

By contrast, the electric utilities' proposed interpretation of the statute would require ignoring the word "any." It is black letter law that statutes should be read "to give effect, if possible, to every clause and word of [the] statute."[78] But the utilities' proposed interpretation of Section 224 would read the word "any" out of the statute, replacing it with "some poles, but not

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[74] *Southern Co.*, 293 F.3d at 1350 (emphasis added, citations omitted). Similarly, when the Commission initially adopted rules implementing Section 224, it explained that when a utility gives access to any pole or right-of-way for wire communications, Section 224 requires it to give access to "*all* poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications." *1996 Local Competition Order* ¶ 1173.

[75] *2018 State/Local Infrastructure Order* ¶ 92 (stating that rights-of-way access encompasses "areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to [] property within such ROW, such as new, existing and replacement *light poles*, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities" (emphasis added)).

[76] In that respect, the requested declaratory ruling is the necessary complement to the *2018 State/Local Infrastructure Order* to ensure that both states and municipalities (under Sections 253 and 332) and private utilities (under Section 224) must provide cost-based access to light poles.

[77] Broadband Deployment Advisory Committee, State Model Code for Accelerating Broadband Infrastructure Deployment and Investment, § 2(51) (defining "pole" as "a pole, such as a utility, lighting, traffic, or similar pole, made of wood, concrete, metal or other material"); Model Code for Municipalities, § 1.2(v) (same).

[78] *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

light poles." The utilities' interpretation would also produce absurd results.[79] For example, many poles used for lighting are also used for other equipment, including local distribution equipment, and Congress could not have intended to exclude those light poles.[80] Even more fundamentally, the utilities' reading would mean that they could unilaterally remove any pole from Section 224 simply by adding lighting features to the pole. Such a loophole would swallow the rule of Section 224 and undermine congressional intent.

Further, as CTIA correctly points out, the utilities' reliance on *Southern Company v. FCC* is misplaced because that decision actually confirms that light poles are covered by Section 224.[81] In *Southern Company*, the court held that electric transmission facilities are not covered by Section 224 because they consist of towers and plant (not poles) and are regulated by another federal agency, the Federal Energy Regulatory Commission (FERC).[82] Light poles are "poles" (not interstate transmission towers or plant) and do not fall within the jurisdiction of FERC or any other federal agency. Moreover, the Eleventh Circuit unequivocally held that Section 224 covers *all* poles owned or controlled by the utility.[83] Thus, under *Southern Company*, light poles fall squarely within Section 224.

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[79] *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting a reading of a statute that "would produce an absurd and unjust result which Congress could not have intended" (internal quotation marks omitted)).

[80] Report and Order, *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, ¶ 21 (2000); *see also Southern Co.*, 293 F.3d at 1344 ("[M]any poles have a shared purpose.").

[81] CTIA Petition at 24-25.

[82] *Southern Co.*, 293 F.3d at 1345. In reaching its decision, the Eleventh Circuit differentiated "transmission facilities" from "local distribution systems." *Id.* Reading the opinion as a whole, *Southern Company* stands for the proposition that light poles are part of that local distribution system.

[83] *Id.* at 1350; *see infra* at 23-24.

On this record, the utilities lack any legitimate basis for continuing to impede 5G deployment by denying access to light poles pursuant to Section 224. Accordingly, the Commission should grant CTIA's request to clarify that Section 224 applies to light poles.

B. The Commission Should Clarify that Utilities May Not Impose Blanket Prohibitions on Access to Any Portions of Poles.

CTIA correctly points out that some electric utilities are violating Section 224 and the Commission's implementing rules by adopting blanket prohibitions to adding attachments to various parts of poles, without providing any legitimate justification. These impermissible blanket prohibitions are impeding AT&T's ability to timely and efficiently deploy the infrastructure needed to support 5G services. Accordingly, AT&T supports CTIA's proposal that the Commission clarify that such blanket prohibitions violate Section 224 and the Commission's implementing rules.

Section 224 provides that utilities may deny access to a pole only "where there is insufficient capacity" or "for reasons of safety, reliability and generally applicable engineering purposes."[84] The Commission's implementing rules require that any such "denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial for access for reasons of lack of capacity, safety, reliability, or engineering standards."[85] In 2011, the Commission further clarified that it "is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about the type of attachment or technology, or a generalized citation to Section 224."[86] Rather, "a utility must explain in writing its precise concerns—and how they relate to lack of

[84] 47 U.S.C. § 224(f)(2).

[85] 47 C.F.R. § 1.1403(b).

[86] *2011 Pole Attachments Order* ¶ 76.

capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue."[87] The Commission reaffirmed these requirements in 2018.[88]

Notwithstanding these requirements, some electric utilities have continued to adopt blanket prohibitions against certain types of attachments or for portions of poles, without providing any specific or legitimate basis for those prohibitions. As CTIA correctly documents, these prohibitions take a number of forms. For example, in some cases, electric utilities have adopted blanket prohibitions to the tops of poles.[89] In other cases, electric utilities are prohibiting attachments to the lower portions of poles.[90] The Commission has already found that wireless attachments to the bottom portions of poles can be safe and feasible,[91] and thus has emphasized that inadequately justified blanket prohibitions against attachments are not permitted, even for portions of the pole that a utility deems "unusable."[92] Yet electric utilities continue this practice. The Commission should thus clarify that these types of inadequately justified blanket prohibitions are unlawful and unenforceable.

In addition, AT&T agrees with CTIA's proposal that the Commission clarify that what it said in its 2011 and 2018 orders holds true today for *any* denial of access, regardless of the type of wireless equipment or where on the pole it is placed. Specifically, the Commission should clarify

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[87] *Id.*

[88] *See 2018 OTMR/Moratoria Order* ¶ 134 n.498.

[89] CTIA Petition at 26.

[90] *Id.* at 20-21.

[91] *2018 OMTR/Moratoria Order* ¶ 134 ("We recognize that there are likely to be circumstances in which using the lower portion of poles to install equipment associated with DAS and other small wireless facilities will be safe and efficient.").

[92] *Id.* ¶ 134 n.498; *see 2011 Pole Attachments Order* ¶ 76.

that before a utility can deny an attachment of any equipment anywhere on any pole, "the utility must explain writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue."[93] Further, AT&T agrees with CTIA that "the Commission should make clear that it will promptly rule on such complaints regarding access refusals, overcharges, or other obstructive practices."[94]

III. THE COMMISSION SHOULD INITIATE A RULEMAKING TO CONSIDER UPDATES TO ITS RULES TO FURTHER FACILITATE COLLOCATIONS THAT MAKE USE OF EXISTING INFRASTRUCTURE FOR DEPLOYMENT.

WIA correctly identifies two targeted updates to the Commission's rules that would help remove unnecessary regulatory hurdles and encourage the use of existing infrastructure for rapid, non-intrusive 5G deployment. First, to further Section 6409(a)'s statutory purpose of facilitating collocations, the Commission should update its rules so that collocations requiring a limited expansion of the facility—for example, to add an equipment cabinet—are covered as EFRs under Section 6409(a), as long as excavation is limited to within 30 feet of the site. Second, the Commission should adopt a rule explicitly requiring, in the context of Section 6409(a), that fees charged by municipalities for processing EFRs must be based on reasonable costs incurred by the municipality.[95]

[93] CTIA Petition at 27.

[94] *Id.*

[95] WIA Rulemaking Petition at 12-13.

A. The Commission Should Amend Its Rules to Indicate that a Limited Expansion Is Not a Substantial Change Under Section 6409(a) Unless Excavation Would Occur More Than 30 Feet from the Site Boundary.

Collocation on existing structures has a number of important advantages over the construction of new structures: it is faster, more cost-effective, and less disruptive to the surrounding environment.[96] Recognizing these benefits, "Congress intended [Section 6409(a)] to facilitate collocation in order to advance the deployment of commercial and public safety broadband services,"[97] and the Commission has followed Congress's lead in recognizing "the need for, and reasonableness of, expediting the siting review of . . . collocations."[98] However, partly as a result of the success of these collocation policies, today, existing structures are running out of space to accommodate additional equipment in their cabinets, and often a limited expansion of the site is necessary to fit in additional equipment.[99] Yet that addition of an equipment cabinet or shelter for additional cabinets can be considered a "substantial change" under the current rules, because even very small changes (such as adding one equipment cabinet to a facility) would count as a "substantial change" if it requires *any* excavation outside the current site.[100] This rigid rule has unnecessarily hampered providers' ability to pursue collocations.

When the Commission initially defined "substantial change" for these purposes, it relied on the definition of "substantial increase in size" from the 2001 Nationwide Programmatic

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[96] *2018 State/Local Infrastructure Order* ¶ 108.

[97] *2014 Wireless Infrastructure Order* ¶ 151; *Montgomery Cty.*, 811 F.3d at 132 (recognizing "Congress's intent to promote the expansion of wireless networks through collocation").

[98] *2018 State/Local Infrastructure Order* ¶ 106.

[99] *See* WIA Rulemaking Petition at 7-8 (explaining that many existing towers were built by a wireless carrier and intended to support the activities of that single carrier, whereas now multiple wireless carriers and public services use the same tower).

[100] 47 C.F.R. § 1.6100(b)(7)(iv).

Agreement for the Collocation of Wireless Antennas ("2001 Collocation Agreement") governing historical preservation reviews.[101] The 2001 Collocation Agreement provides that any excavation outside the site boundary constitutes such a "substantial increase in size" that would trigger historic and tribal review.[102] But the adoption of that standard now means that even limited expansions that expand the compound only slightly to accommodate extra equipment are considered a "substantial change" because of excavation outside of the site.

Modernization of this rule is necessary given the changes that have occurred in the intervening years. The definition in the 2001 Collocation Agreement may have made sense when the idea of any excavation outside the site was only necessary with respect to large-scale changes to the compound. But that approach did not, and could not have, accounted for the large number of small expansions that would become necessary when existing compounds ran out of space in their preexisting cabinets and shelters, and which also require excavation outside the site boundary but involve only slight expansions of the site. As a matter of statutory construction, Section 6409(a) was intended to cover any modification that "does not substantially change *the physical dimensions of [a] tower or base station*."[103] In other words, the key test is whether the physical dimensions of the tower or station would be substantially changed. Yet under the rigid rule that treats *any* excavation outside the site as a substantial change, even minor modifications that do not materially change the physical dimensions of a tower are treated as substantial changes that fall outside the scope of Section 6409(a).

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[101] *2014 Wireless Infrastructure Order* ¶ 198; *see* 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("2001 Collocation Agreement").

[102] 2001 Collocation Agreement, § I.C.4.

[103] 47 U.S.C. § 1455(a)(1) (emphasis added).

As WIA notes, the 2001 Collocation Agreement is not the only possible reference point. The more recent 2005 Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("2005 NPA") incorporates a 30-foot standard for excavation: in the context of replacement towers, the 2005 NPA does not treat excavation within 30 feet of a site as a substantial change.[104] In the context of Section 6409(a), some leeway for limited excavation outside the site boundary would go a long way in continuing to promote collocation even for structures that are running out of equipment space.

Accordingly, AT&T supports WIA's request for the Commission to commence a rulemaking process to consider amending its rules. As WIA suggests, the Commission should consider amending the definition of a "site" under Section 1.6100(b)(6) to be "*an area no more than 30 feet beyond* the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site" (addition in italics).[105] Alternatively, the Commission could modify the excavation aspect of its "substantial change" definition under Section 1.6100(b)(7)(iv) so that substantial change applies to a modification only if "it entails any excavation or deployment *more than 30 feet beyond* the current site" (addition in italics).[106] These targeted changes to Section 1.6100 would more appropriately account for the current realities of collocation for 5G and continue to promote the use of existing infrastructure, while continuing to exclude from Section 6409(a) protection modifications that substantially change *the physical dimensions of a tower or base station*.[107]

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[104] 47 C.F.R. Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("2005 NPA"), § III.B.

[105] 47 C.F.R. § 1.6100(b)(6).

[106] 47 C.F.R. § 1.6100(b)(7)(iv).

[107] AT&T also agrees with WIA's request to amend Rule 1.6100(b)(7)(iii) so that the addition of a single equipment shelter would not be included in the substantial change definition. WIA

B. The Commission Should Amend Its Rules to Require that Fees for Processing EFRs Must Be Cost-Based, and that Failure to Pay Disputed Fees Is Not a Valid Basis for Refusing to Process an EFR Application.

Despite the Commission's declaration that state and local fees related to wireless deployment must be reasonable and non-discriminatory,[108] WIA points out that municipalities continue to demand unreasonable fees for processing EFRs.[109] These fees can involve deposits or fees for review upwards of $10,000, but municipalities have also began to demand other fees, such as escrow fees or intake fees, and to explore other ways to extract payment from telecommunications providers dependent on approval of EFRs.[110] For example, AT&T has received, for a building permit that had already been processed and received, a city's demand for a "yearly renewal fee" of $750.00 for its EFR site, ostensibly for perpetuity.

To prevent these harmful practices, AT&T supports WIA's proposal that the Commission amend its rules to require that fees for processing EFRs must be a reasonable approximation of the actual and direct costs incurred by the municipality in reviewing the EFR applications. AT&T also agrees with WIA's proposal that, to prevent municipalities from using disputed fees as a reason to refuse processing an EFR as they are statutorily required to do,[111] the Commission could

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Rulemaking Petition at 9 n.32. Even if the Commission wishes to continue to follow the 2001 Collocation Agreement, that agreement too provides that the addition of one new equipment shelter is not a substantial change. 2001 Collocation Agreement, § I.C.2.

[108] *2018 State/Local Infrastructure Order* ¶¶ 50, 74.

[109] WIA Rulemaking Petition at 12-13; *see also* WIA Petition at 20-21.

[110] *Id.*

[111] *Montgomery Cty.*, 811 F.3d at 128 (recognizing that the Spectrum Act and Section 6409(a) were intended to avoid "protracted approval processes" for collocation applications); *see 2018 State/Local Infrastructure Order* ¶ 74 ("[W]e find it unlikely that Congress would have left providers entirely at the mercy of effectively unconstrained requirements of state or local governments.").

amend its rules to state that failure to pay disputed fees is not a valid basis for refusing to process, or denying, an EFR.[112]

These rule changes would be a natural corollary to the Commission's prior rulings in the Section 6409(a) context. Last year, the Commission declared that "application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of Small Wireless Facilities" must be "a reasonable approximation of the state or local government's costs," factoring in "objectively reasonable costs."[113] The Commission specifically provided that "one-time fees for municipal applications and permits, such as an electric inspection or a building permit, should be based on the cost to the government of processing that application."[114] As Chairman Pai explained in his accompanying statement, that 2018 Order means that "all fees must be non-discriminatory and cost-based."[115] Specifically stating in the context of Section 6409(a) that fees assessed by municipalities must be based on reasonable approximations of their costs for processing EFRs would be a logical extension of the Commission's work in ensuring that local fees are reasonable and not unwarranted impediments to the approval of EFRs.[116] Accordingly, AT&T joins WIA in urging the Commission to

[112] AT&T also agrees with WIA's request that any escrow or deposit fees required for an EFR application should only be used for review that is reasonably related to determining whether the request is covered by Section 6409(a). *See* WIA Rulemaking Petition at 13.

[113] *2018 State/Local Infrastructure Order* ¶ 50.

[114] *Id.* ¶ 74.

[115] *Id.*, Statement of Chairman Ajit Pai.

[116] *Id.* ¶ 54 ("[O]ur evaluation of the material effects of fees on the deployment of Small Wireless Facilities does not differ whether the fees are for ROW access, use of government property within the ROW, or one-time application and review fees or the like—any of which drain limited capital resources that otherwise could be used for deployment . . . .").

commence a rulemaking proceeding to update its rules to further promote collocations and the rapid deployment of 5G.

CONCLUSION

For the foregoing reasons, the Commission should grant the Petitions in the manner described herein.

Respectfully submitted,

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